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10
11 **UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

12 DANIEL ROSENBAUM, *et al.*,

13 Plaintiffs,

14 v.

15 PERMIAN RESOURCES CORP., *et al.*,

16 Defendants.

17 BRIAN COURTMANCHE, *et al.*,

18 Plaintiff,

19 v.

20 PERMIAN RESOURCES CORP., *et al.*,

21 Defendants.

22 JOHN MELLOR, on behalf of himself and
23 all others similarly situated,

24 Plaintiff,

25 v.

26 PERMIAN RESOURCES CORP., *et al.*,

27 Defendants.

12 CONSOLIDATED CASE
13 NO. 2:24-cv-00103-MMD-MDC

14
15 **PLAINTIFFS' MOTION FOR PRE-
16 RULE 26(f) DISCOVERY OF
17 DOCUMENTS DEFENDANT PIONEER
18 PREVIOUSLY PRODUCED TO THE
19 FEDERAL TRADE COMMISSION**

20
21 CONSOLIDATED CASE
22 NO. 2:24-cv-00198-MMD-MDC

23
24 CONSOLIDATED CASE
25 NO. 2:24-CV-00253-MMD-MDC

1 On May 2, 2024, the Federal Trade Commission (“FTC”) announced they had reached a
 2 consent decree with Exxon Mobil, Inc. (“Exxon”), in connection with Exxon’s pending
 3 acquisition of Defendant Pioneer Natural Resources Inc. (“Pioneer”) (the merger, the “Exxon-
 4 Pioneer Merger” or “Merger”).¹ This decree forbids Pioneer’s former-CEO Scott Sheffield from
 5 joining Exxon’s Board of Directors based on FTC’s evidence of Sheffield’s years-long efforts to
 6 fix the price of crude oil.²

7 The decree follows from an FTC administrative complaint (the “FTC Complaint”), which
 8 was also released in redacted form on May 2, 2024.³ The FTC Complaint states:

9 Through public statements and private communications, Pioneer
 10 founder and former CEO Scott D. Sheffield has campaigned to
 11 organize anticompetitive coordinated output reductions between
 12 and among U.S. crude oil producers, and others, including the
 13 Organization of Petroleum Exporting Countries (“OPEC”), and a
 14 related cartel of other oil-producing countries known as OPEC+.
 15 Mr. Sheffield’s communications were designed to pad Pioneer’s
 16 bottom line—as well as those of oil companies in OPEC and OPEC+
 17 member states—at the expense of U.S. households and businesses.

18 FTC Complaint, ¶1. The FTC Complaint references documents, including Mr. Sheffield’s
 19 WhatsApp and text messages, that Defendant Pioneer produced to the FTC as part of the FTC’s
 20 review of the Merger. *See id.*, ¶¶5-6. Contemporaneous public reporting suggests that Pioneer
 21 submitted “millions of documents” to the FTC – hundreds of which were communications
 22 between Sheffield, Pioneer’s competitors, and/or OPEC – as part of the agency’s second-level
 23 review into the Merger’s possible anticompetitive effects.⁴

24 FTC Chair Lina Khan summarized the findings:

25 A core principle that should underpin the Commission’s antitrust
 26 analysis is examining and understanding commercial realities.
 27 Sometimes the evidence that is most probative of commercial
 28 realities is how market participants act. Staff’s investigation here
 29 uncovered troubling evidence of Pioneer CEO Scott Sheffield’s
 30 actions and communications, which make clear that he believed and

1 See Declaration of Patrick Coughlin, filed herewith (“Coughlin Decl.”), Ex. 1 (FTC Press
 2 Release).

2 Coughlin Decl., Ex. 2 (Consent Order).

3 Coughlin Decl., Ex. 3 (FTC Complaint).

4 See Coughlin Decl., Ex. 4 (WSJ Article).

1 acted as if he could persuade his rivals to join him in colluding to
 2 restrict output and raise prices. When market actors speak and act
 3 as if they can collude, we should not ignore this direct evidence[.]⁵

4 These documents and materials produced to the FTC are indisputably relevant and
 5 discoverable in this action as they track the core conspiratorial allegations by the Plaintiffs. On
 6 May 2, 2024, Plaintiffs from all cases⁶ collectively requested that Defendant Pioneer produce its
 7 FTC productions. On May 6, 2024, the Parties met and conferred, and Plaintiffs offered to narrow
 8 their request to only the custodial files of Mr. Sheffield that Pioneer produced to the FTC. On
 9 May 7, 2024, Pioneer confirmed they opposed Plaintiffs' request. Plaintiffs are entitled to the
 10 prompt production of Mr. Sheffield's custodial documents produced to the FTC, which
 11 presumably are a small, easily producible subset of Pioneer's regulatory production.⁷ Indeed,
 12 good cause exists to order their production at this stage: making available to Plaintiffs this limited
 13 subset of previously produced documents will likely narrow key liability issues in the litigation

14
 15 ⁵ Coughlin Decl., Ex. 5 (May 2, 2024 statement of Chair Lina Khan in the Matter of Exxon
 16 Mobil Corp.).

17 ⁶ *Rosenbaum v. Permian Resources Corp, et al.*, No. 2:24-cv-00103-MMD-MDC (D. Nev.),
 18 filed January 12, 2024; *Andrew Caplen Installations LLC v. Permian Resources Corp, et al.*, No.
 19 2:24-cv-00150-MMD-MDC (D. Nev.), filed January 22, 2024 ("Rosenbaum"); *These Paws Were
 20 Made For Walkin' LLC v. Permian Resources Corp, et al.*, No. 2:24-cv-00164-MMD-MDC (D.
 21 Nev.), filed January 24, 2024; *Courtmanche v. Periman Resources Corp. et al*, No. 2:24-cv-
 22 00198-MMD-MDC (D. Nev.), filed January 29, 2024; *Mellor v. Permian Resources Corp. et al*,
 23 No. 2:24-cv-00253-MMD-MDC (D. Nev.), filed February 6, 2024; *Santillo v. Periman Resources
 24 Corp. et al*, No. 2:24-cv-00279-MMD-MDC (D. Nev.), filed February 8, 2024; *Beaumont v.
 25 Periman Resources Corp. et al*, No. 2:24-cv-00298-MMD-MDC (D. Nev.), filed February 12,
 26 2024; *MacDowell v. Permian Resources Corp. et al*, No. 2:24-cv-00325-MMD-MDC (D. Nev.),
 27 filed February 15, 2024; *Western Cab Company v. Periman Resources Corp. et al*, No. 2:24-cv-
 28 00401-MMD-MDC (D. Nev.), filed February 28, 2024 (collectively "Plaintiffs").

7 As explained to Pioneer, Plaintiffs seek production of documents and communications
 8 previously produced to the FTC that resided with Mr. Sheffield, even if those documents and
 9 communications were produced to the FTC from the files of another document custodian. For
 10 example, if an identical file resides with three Pioneer custodians, one of which was Mr. Sheffield,
 11 and Pioneer produced only the copy collected from an employee other than Mr. Sheffield,
 12 Plaintiffs still seek the production of that document (*e.g.*, a group email from Mr. Sheffield
 13 copying two colleagues) (hereinafter, this set of documents, the "Sheffield FTC Custodial
 14 Documents"). This should create no additional burden for Pioneer as the FTC's production
 15 specifications required Pioneer to list all "Alternative Custodians," that is, all custodians of the
 16 documents produced, regardless of whether their copy of the document was the one given to the
 17 FTC. See Coughlin Decl., Ex. 6 (FTC Bureau of Competition's Production Guide: An eDiscovery
 18 Resource), §§2.1 & 2.3. Thus, Pioneer should easily be able to filter their FTC production for all
 19 documents where Mr. Sheffield is listed in the metadata fields as a "Custodian" and/or
 20 "Alternative Custodian."

1 (including at the pleading stage) and streamline the discovery process, without unduly burdening
 2 Pioneer.

3 Pioneer has refused to produce these undeniably relevant documents. Plaintiffs now bring
 4 this motion and respectfully request that the Court order Pioneer to reproduce to Plaintiffs within
 5 30 days the Sheffield FTC Custodial Documents.

6 **I. LEGAL STANDARD**

7 Rule 26(d)(1) provides that “[a] party may not seek discovery from any source before the
 8 parties have conferred as required by Rule 26(f), except . . . when authorized by these rules, by
 9 stipulation, or by court order.”⁸ “In deciding whether to allow early discovery, courts apply a
 10 good cause standard.” *Jones v. Micron Tech. Inc.*, No. 18-CV-3805-JSW (KAW), 2019 WL
 11 5406824, at *1 (N.D. Cal. Oct. 23, 2019). “Good cause may be found where the need for expedited
 12 discovery, in consideration of the administration of justice, outweighs the prejudice to the
 13 responding party.” *Semitool, Inc. v. Tokyo Electron Am., Inc.*, 208 F.R.D. 273, 276 (N.D. Cal.
 14 2002). In determining whether good cause exists, the court should balance the relevance of the
 15 discovery requested against the burden on the party ordered to produce the documents. *In re
 16 Lithium Ion Batteries Antitrust Litig.*, No. 13-MD-02420 YGR, 2013 WL 2237887, at *2 (N.D.
 17 Cal. May 21, 2013).

18 **II. THE DOCUMENTS REQUESTED ARE FACIALLY RELEVANT**

19 The FTC Complaint, while heavily redacted, confirms that the documents requested are
 20 directly relevant to Plaintiffs’ allegations as they address the same anticompetitive conduct at the
 21 center of Plaintiffs’ complaints. For example, Plaintiffs allege that Mr. Sheffield made public
 22 statements coordinating oil production discipline amongst the Defendants.⁹ The FTC Complaint
 23 references the same statements, and others, as evidence of their allegation that Mr. Sheffield was
 24 illegally coordinating Defendants’ production decisions.¹⁰ Plaintiffs also allege that Mr. Sheffield
 25 acted as a conduit and helped Pioneer and the other named Defendants coordinate their production

26
 27 ⁸ Plaintiffs have asked Defendants to meet-and-confer in accordance with Rule 26(f), but
 Defendants have yet to respond.

28 ⁹ *Rosenbaum* Complaint (ECF No. 1), ¶¶59, 69-71, 83, 89, 91, 93-96.
¹⁰ FTC Complaint, ¶¶25, 27-30.

1 levels amongst themselves and with OPEC+.¹¹ The FTC Complaint describes in detail evidence
 2 produced by Pioneer from Mr. Sheffield's custodial files that the FTC alleges demonstrates Mr.
 3 Sheffield "directly communicated with high-ranking OPEC officials," "exchanged information on
 4 oil pricing and output with OPEC representatives," and "worked to facilitate direct
 5 communications between his competitors in the Permian Basin and OPEC."¹² Consequently, it is
 6 evident that Pioneer has already produced to the FTC many of the co-conspirator communications
 7 that Plaintiffs have alleged transpired and will seek to prove their case, leaving Pioneer grounds
 8 only to argue when, not if, these documents should be produced in discovery.

9 **III. RE-PRODUCING A SUBSET OF PIONEER'S GOVERNMENT 10 PRODUCTIONS NOW IS APPROPRIATE**

11 District courts regularly order defendants to re-produce prior regulatory productions early
 12 in antitrust cases. *See, e.g., Lithium Ion Batteries Antitrust Litig.*, 2013 WL 2237887, at *1-*3
 13 (ordering certain defendants to re-produce documents produced to DOJ within 30 days and before
 14 plaintiffs' deadline to file a consolidated complaint); *In re High-Tech Emp. Antitrust Litig.*, No.
 15 11-cv-2509-LHK (N.D. Cal. Oct. 26, 2011), ECF No. 88, Minute Order and Case Management
 16 Order (ordering defendants to re-produce documents produced to DOJ within 30 days while
 17 motion to dismiss pending); *In re Farm-Raised Salmon Prods. Antitrust Litig.*, No. 19-cv-21551-
 18 CMA (S.D. Fla. Apr. 6, 2020) ECF No. 207, Third Scheduling Order (ordering defendants to re-
 19 produce government documents before the deadline to file a motion to dismiss); *In re Pool Prods.
20 Distrib. Market Antitrust Litig.*, No. 2:12-md-02328-SSV-JCW (E.D. La. June 4, 2012) ECF No.
 21 93, Pretrial Order #5 (same); *In re Dairy Farmers of Am., Inc. Cheese Antitrust Litig.*, No. 1:09-cv-
 22 03690 (N.D. Ill. Mar. 4, 2010), ECF No. 75, Pretrial Order No. 1 Regarding Consolidation and
 23 Management of Litigation (same).¹³

24
 25 ¹¹ Rosenbaum Complaint, ¶¶69-70, 83, 91.
 26 ¹² FTC Complaint, ¶¶36, 41-42.
 27 ¹³ See also *Rumble, Inc. v. Google LLC*, No. 21-cv-0229-HSG-LJC, 2023 WL 3751797, at
 28 *7-*8 (N.D. Cal. May 31, 2023) (granting plaintiff's motion to compel defendant to produce
 documents it produced to the DOJ and state Attorneys General because those investigations'
 allegations had "significant factual and legal overlap" with the allegations made by plaintiff in its
 antitrust claim).

1 This trend holds even in cases where the procedural posture is such that plaintiffs' request
 2 comes before the parties have met for a Rule 26(f) conference. *See e.g., Klein, et al. v. Meta*
 3 *Platforms, Inc.*, No. 3:20-cv-08570 (N.D. Cal Apr. 2, 2021), ECF No. 82, Case Management Order
 4 (ordering Meta to produce within 30 days its prior FTC antitrust investigation production prior to
 5 the parties' Rule 26(f) conference); *In re Cattle Antitrust Litig.*, No. 19-cv-1222 (D. Minn. Sep.
 6 10, 2020), ECF No. 259 (ordering DOJ production prior to Rule 26(f) conference and while
 7 motions to dismiss were pending); *In re Diisocyanates Antitrust Litig.*, No. 18-1001, 2019 WL
 8 1069660, at *1 (W.D. Pa. Jan. 15, 2019) (granting plaintiffs motion, submitted before holding a
 9 Rule 26(f) conference, for production of documents produced to the DOJ); *In re Liquid Aluminum*
 10 *Sulfate Litig.*, No. 2:16-md-2687-MCA-MAH (D.N.J. July 5, 2016), ECF No. 209 (ordering
 11 production of documents previously produced to the DOJ prior to Rule 26(f) conference).

12 Reproduction of the Sheffield FTC Custodial Documents will make the discovery process
 13 more efficient by focusing the parties' negotiations on the scope of party discovery, including as
 14 to search terms, the number and identity of document custodians, and the number of depositions
 15 likely to be required. *See In re Broiler Chicken Antitrust Litig.*, No. 1:16-cv-08637, 2017 WL
 16 4417447, at *6-*7 (N.D. Ill. Sept. 28, 2017) (re-productions of government documents could
 17 enable more "intelligent[]" discovery conversations later in the case). Moreover, given the FTC
 18 Complaint references evidence that Mr. Sheffield participated in improper communications with
 19 OPEC and OPEC+ officials, the production of these documents now will allow Plaintiffs to
 20 identify relevant third-party witnesses early and take steps to ensure those third parties are
 21 preserving evidence relevant to the litigation. As Plaintiffs noted in their Opposition to
 22 Defendants' Motion to Transfer, third-party discovery of OPEC+ officials residing abroad will
 23 likely be complex;¹⁴ enabling Plaintiffs to start this process now significantly decreases the
 24 likelihood of future delay.¹⁵

25
 26¹⁴ *Rosenbaum*, ECF No. 166, at 20.

27 Further, to the extent that the Court ultimately requires Plaintiffs in the recently
 28 consolidated suits to file consolidated amended complaints prior to Defendants' deadline to
 answer or otherwise respond to Plaintiffs' complaints, the early production of these documents
 facilitates a more efficient use of judicial and party resources. It would be inefficient to have the

1 Re-producing the requested documents Pioneer so recently produced to the FTC¹⁶ will
 2 burden Pioneer only minimally, if at all, notwithstanding the cases' procedural posture.¹⁷ *See,*
 3 *e.g.*, Coughlin Decl., Ex. 9 (*In re Lithium Ion Batteries Antitrust Litig.*, No. 13-md-02420-YGR
 4 (N.D. Cal. Apr. 13, 2013), ECF No. 148, Hearing Transcript) ("the expense argument doesn't
 5 exist because all of the expense has already been incurred so there isn't a significant expense for
 6 the defendants"); *Diisocyanates*, 2019 WL 1069660, at *1 ("the cost of production and the burden
 7 of producing the records should be minimal due to the previous production"); *Liquid Aluminum*,
 8 ECF No. 209 at 4 ("unlikely" that re-production would cause significant burden "considering that
 9 [d]efendants have already assembled all of the materials in question in connection with the DOJ's
 10 investigation"); *In re Platinum & Palladium Commodities Litig.*, No. 10-cv-3617-WHP, 2010 WL
 11 11578945, at *1 (S.D.N.Y Nov. 30, 2010) (request that defendants produce "approximately
 12 250,000 pages" of records previously produced "not overly burdensome").

13 Moreover, Plaintiffs' request does not prejudice Pioneer in circumstances where the
 14 requested expedited production is made up of documents that will inevitably be produced during
 15 discovery. *Semitool*, 208 F.R.D. 273 at 276-77 ("the Court is unable to discern any real prejudice
 16

17 Plaintiffs file consolidated amended complaints in the near term, only for them to shortly thereafter
 18 seek leave to file further amended complaints to reflect the information that Pioneer would then
 19 produce.

20 ¹⁶ Exxon and Pioneer announced the merger on October 11, 2023, and Exxon and Pioneer
 21 complied with the FTC's second request for information and documents in early April 2024. *See*
 22 Coughlin Decl., Exs. 7 (Merger Press Release) & 8 (Bloomberg Article). Consequently, the
 23 documents at issue were produced within the last six months, with the bulk of Mr. Sheffield's
 24 custodial files likely to have been included in the response to the FTC's second request, delivered
 25 one month ago.

26 ¹⁷ Plaintiffs narrowed their request to the Sheffield FTC Custodial Documents in an attempt
 27 to conserve judicial resources by limiting the scope of the dispute before the Court to only the
 28 most relevant subset of Pioneer's FTC production, and based on the understanding that Pioneer
 can easily filter these files from its entire production. Plaintiffs do not, in so requesting, intend to
 imply that the other records produced to the FTC are not relevant to the present dispute. Should
 Pioneer claim that it would be more burdensome for it to filter Mr. Sheffield's files that Plaintiffs
 seek, in the alternative, Plaintiffs respectfully request an order compelling Pioneer to reproduce
 its entire FTC production as documents related to Defendants' merger activity in the relevant
 market are relevant and discoverable. *See, e.g.*, *In re Blue Cross Blue Shield Antitrust Litig.*, No.
 2:13-CV-20000-RDP, 2015 WL 13755437, at *2 (N.D. Ala. Oct. 20, 2015) (ordering defendants
 to produce merger documents, including those produced to regulators); *cf. In re Dealer Mgmt.*
Sys. Antitrust Litig., No. 18-CV-864, 2018 WL 11260473, at *3 (N.D. Ill. Aug. 14, 2018)
 (defendant ordered to produce relevant documents previously produced to FTC during its inquiry
 into defendants' proposed merger as they went to "competition in the [relevant] market").

1 to [d]efendants in advancing discovery by a modest amount of time,” even while a motion to
 2 dismiss is pending, when “[d]efendants concede the requested information is relevant and will be
 3 produced in the normal course of discovery”); *In re Toyota Motor Corp. Unintended Acceleration*
 4 *Mktg., Sales Pracs. & Prods. Liab. Litig.*, No. 8:10-ML-02151-JVS-FMO (C.D. Cal. June 1,
 5 2010), ECF No. 180, Order No. 3, at 2 (ordering expedited discovery of a “defined set of
 6 documents, consisting of approximately 75,000 to 100,000 pages, much or all of which is likely
 7 to be discoverable, and which has already been produced to [g]overnment entities to date”); *In re*
 8 *Milk Prod. Antitrust Litig.*, 84 F. Supp. 2d 1016, 1027-28 (D. Minn. 1997) (“[T]o the extent that
 9 [documents produced to regulators] may lead to discoverable information, [d]efendants must turn
 10 them over.”), *aff’d*, 195 F.3d 430 (8th Cir.).

11 Plaintiffs request facially relevant documents, the early production of which will greatly
 12 increase the efficiency of this litigation, because these documents have already been assembled,
 13 will eventually be produced in this litigation regardless, and early production will not unduly
 14 burden Pioneer. Moreover, the FTC has confirmed that it has referred Pioneer’s and Mr.
 15 Sheffield’s apparent breach of the antitrust laws to the DOJ.¹⁸ Without the requested discovery,
 16 Plaintiffs will be operating at a significant information disadvantage relative to Defendants and
 17 government regulators, hindering their strategic decision-making as this case proceeds. *In re Bank*
 18 *of Am. Corp. Sec., Derivative, & Emp’t Ret. Income Sec. Act (ERISA) Litig.*, No. 09 MDL 2058
 19 (DC), 2009 WL 4796169, at *1, *3 (S.D.N.Y. Nov. 16, 2009) (without re-production of
 20 government documents the plaintiffs and court “will be less able to make informed decisions about
 21 litigation strategy”).

22 Consequently, Pioneer should re-produce the Sheffield FTC Custodial Documents to
 23 Plaintiffs within 30 days.¹⁹

24
 25
 26¹⁸ Coughlin Decl., Ex. 4.

27¹⁹ To the extent Pioneer raises concerns about the confidential nature of the documents,
 28 Plaintiffs confirm they are willing to treat any production on an attorneys-eyes-only basis until
 such a time as a Protective Order – a draft of which Plaintiffs circulated to Defendants on May 7,
 2024 – is entered, at which time Pioneer can designate the production in accordance with its terms.

DATED this 8th day of May, 2024

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of MORRIS, SULLIVAN & LEMKUL, LLP, and that I caused a true and correct copy of the foregoing PLAINTIFFS' MOTION FOR PRE-RULE 26(f) DISCOVERY OF DOCUMENTS DEFENDANT PIONEER PREVIOUSLY PRODUCED TO THE FEDERAL TRADE COMMISSION to be served via Electronic Service to all parties and counsel identified on the CM/ECF System via electronic notification on this 8th day of May, 2024.

/s/Dominique Rocha

An Employee of Morris, Sullivan & Lemkul